Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-43

JAMES J. BOBULSKI,

PETITIONER,

VS.

STATE OF OHIO,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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CITATION TO OPINIONS BELOW

The Supreme Court of Ohio did not render a written opinion.

The opinion of the Franklin County, Ohio Court of Appeals, Tenth Judicial District, is unreported and is reprinted in the appendix attached hereto.

JURISDICTION

The order of the Ohio Supreme Court denying leave to appeal was rendered on April 12, 1979. The jurisdiction of this Court is invoken under 28 USC 1257(3).

QUESTIONS PRESENTED

I. Is a search justified under the "plain view" doctrine where police officers without a warrant enter the enclosed area of an apartment complex for the sole purpose of

peering into the window of one apartment in an effort to obtain a glimpse of contraband, which they expect to be present.

II. Is the seizure of suspected contraband, without a warrant, unreasonable in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States where police officers observe what they believe to be contraband within a constitutionally protected area, they have an ample opportunity to secure a search warrant before seizing the suspected contraband, and no exigent circumstances exist?

III. Are incriminating statements made to police officers, which are the direct fruits of an illegal arrest, obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses on his favor, and to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On the morning of October 26, 1977, Columbus Police narcotics officers had established surveillance on a residence apartment building at 28 Sherman Avenue. This apartment building was in a complex of similar buildings. The apartment complex is situated approximately forty (40) yards from the street, and is surrounded by a chain-link fence and shubbery, which separates the apartment property from public property. Access to the complex is maintained by strategically located gates. There is a public sidewalk which runs parallel to and outside of this chain-link fence for public use.

Police narcotic officers who had established this surveillance observed petitioner enter the 28 Sherman Avenue apartment, where he was greeted by Taylor, a co-defendant. Officer Stevens then left his surveillance position on the public street, entered the fenced area surrounding the apartment, and walked up an apartment walkway which was parallel to the apartment for the sole purpose of peering into the bay window of the apartment. The officer did peer into the apartment window and observed the petitioner handling several plastic baggies containing a brown substance. The officer next knocked on the apartment door, waited, knocked again, heard commotion inside, peered through the window again, and observed Taylor moving toward the rear of the apartment. Taylor was apprehended in the fenced-in back yard of the apartment. Petitioner Bobulski remained in the apartment and was arrested therein. The brownish substance and other suspected controlled substances were seized, and both petitioner and Taylor were arrested. Petitioner was charged with one count of possession of marijuana and two counts of possession of Schedule II drugs.

Petitioner timely filed motions to suppress the physical evidence seized and to suppress statements made following his arrest. In said motions petitioner raised the constitutional questions presented herein.

A suppression hearing was held in the trial Court, and all suppression motions were overruled.

Petitioner Bobulski entered a plea of no contest to trafficking in marijuana in violation of O.R.C. § 2925.03 (A)(6). Petitioner was found guilty and duly sentenced.

Petitioner perfected his appeal to the Franklin County Court of Appeals, Tenth Judicial District, wherein he raised assignments of error relating to the search and seizure of physical evidence and the suppression of statements.

On December 14, 1978,, the Franklin County Court of Appeals overruled all assignments of error holding that Columbus police officers had the right to peer into the apartment window from the enclosed apartment area, as there was no reasonable expectation of privacy therein. (Appendix.) The Court further held that the inadvertence requirement of the "plain view" exception to the warrant requirement was inapplicable in the instant case, since the observations were made during the investigation of criminal activity. (Appendix.)

On January 12, 1979 petitioner filed a Notice of Appeal to the Supreme Court of Ohio and on February 12, 1979 petitioner filed a memorandum in support of jurisdiction in the Ohio Supreme Court. On April 12, 1979 the Ohio Supreme Court denied jurisdiction and refused to hear the case.

REASONS FOR GRANTING THE WRIT

1. WHERE POLICE OFFICERS ENTER THE ENCLOSED AREA OF AN APARTMENT COMPLEX FOR THE SOLE PURPOSE OF PEERING INTO THE WINDOW OF ONE APARTMENT IN AN EFFORT TO OBTAIN A GLIMPSE OF CONTRABAND, WHICH THEY EXPECT TO BE PRESENT, SUCH POLICE ACTIVITY CONSTITUTES A SEARCH, IS NOT JUSTIFIED UNDER THE "PLAIN VIEW" DOCTRINE, AND IS VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The issue of the extent of privacy and freedom under the Fourth and Fourteenth Amendments from visual governmental intrusion which an apartment occupant may reasonably anticipate is central to the case at bar. The Supreme Court's seminal decision dealing with the scope of the Fourth Amendment protection was *Katz vs. United States, 389 U.S. 343 (1967).* In *KATZ,* the Court held that the government's placement of an electronic listening device onto the exterior of a public phone booth violated the defendant's Fourth Amendment right to be free of unreasonable searches and seizures. Justice Stewart, writing for the majority in *KATZ,* stated that the Fourth Amendment protects

> people and not simply "areas" – against unreasonable searches and seizures . . . [and] the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.
>
> *KATZ* at 353.

The Court found that the government's activities in electronically eavesdropping on and recording the defendant's telephone conversations without first obtaining a warrant violated the privacy upon which the defendant justifiably relied. *KATZ* for the first time specifically set forth the doctrine that Fourth Amendment protections attach whenever the government invaded a citizen's "reasonable expectation of privacy."

Petitioner respectfully submits and, if Certiorari is granted, will argue that an occupant of a private apartment, which is separated from public areas by a distance of some 40 yards, by a chain-link fence, shrubbery and gates, has the right to reasonably expect that activities undertaken within the confines of the apartment will not be surreptiously observed by the intruding eye of government officers. Petitioner further submits that the governmental intrusion of the constitutionally protected area in the instant case runs contrary to the spirit and the letter of the Fourth and Fourteenth Amendments and of *KATZ,* supra.

A second and equally important, issue presented by the instant case is the application of the "plain view" exception to the warrant requirement. *Coolidge vs. New Hampshire, 403 U.S. 443 (1971).*

There was no attempt by the State or by the Courts below to justify the police search in this case by any reasons other than the plain view exception to the warrant requirement.

In *Coolidge vs. New Hampshire, 403 U.S. 434 (1971),* the Court set forth the elements which must be proven in order to justify a warrantless search on the basis of the plain view exception to the warrant requirement. The Court held the following must be shown:

> (1) The initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent.

As to the first requirement set forth in the *COOLIDGE*, case, *SUPRA*, Petitioner respectfully submits and, if certiorari is granted, will argue that the officers had no right to be in the enclosed apartment complex area for the sole purpose of peering in petitioner's apartment window. In *United States vs. Davis, 423 F.2d 974 (5th Circuit 1970), cert. denied 400 U.S. 836 (1970)*, law enforcement officers returned to the defendant's premises at about 10:30 p.m. to search for a gun that had been discarded by the defendant in a melee that had occurred on the premises earlier that afternoon. The government claimed that a search warrant was not required because the gun was in plain view. The Court noted that the plain view rule only applied when the officer had a right to be in the position to have that view. Because the officer had to trespass into a constitutionally protected area in order to secure that view, the Court quickly dismissed the government's argument.

The Court did not consider *KATZ* in determining the scope of Fourth Amendment protection. It stated:

> The high degree of judicial sanctity which the Courts have accorded to dwellings is based upon the concept of privacy and the right to be left alone. The security of homes should not be left to the sole discretion of police officers.
>
> *DAVIS* at 977.

Implicit in the Court's rationale is the belief that the

Fourth Amendment protects both the security of the home and the individual's right to privacy.

Other Courts have reached a similar view. See *United States vs. Carriger, 541 F.2d 545 (6th Cir. 1976); United States vs. Hunt, 505 F.2d 931 (5th Cir. 1974), cert. denied 421 U.S. 975 (1975); State vs. Colvin, 358 So. 2d 1250 (La S. Ct. 1978); Morsman vs. State, 350 So. 2d 137 (Fla. App. Ct. 1978); People vs. Powell, 256 N.W. 2d 583; 76 Mich. App. 237 (1977).*

In *United States vs. Carriger, supra, the* Sixth Circuit Court of Appeals citing *Katz vs. United States, Supra,* concluded that trespassing is one form of intrusion by the government that may violate a person's reasonable expectation of privacy. The Court quoted extensively from the Fifth Circuit decision, *Fixel vs. Wainwright, 492 F.2d 480 (5th Circuit 1974)*, wherein the Court explained that property concepts were helpful to an investigation of one's reasonable expectation of privacy because they assisted in establishing the perameters of Fourth Amendment protection as they concern the home. The Court stated that a tenant expects other tenants and invited guests to enter into the common areas of the building but does not expect trespassers to do the same. The trespass of the officer violated the defendant's subjective expectation of privacy and the Court found that expectation reasonable. Specifically, the Court stated:

> The area immediately surrounding and closely related to the dwelling is also entitled to the Fourth Amendment's protection. In defining the surrounding area entitled to such protection, the Courts historically have found helpful the common law concept of curtilage, meaning "yard, courtyard, or other piece of

ground included within the fence surrounding a dwelling house.

[Citation omitted.]

When officers have physically invaded this protected area, either to seize evidence or to obtain a view of illegal activities, we have readily condemned such an invasion as violative of the Fourth Amendment.

Fixel vs. Wainwright at 483. (emphasis added.)

The same result, using the dual criteria of "privacy" and "trespass," has been reached in other circuits. See *Wattenburg vs. United States, 388 F.2d 853 (9th Cir. 1968).*

In the instant case, the police invaded common areas surrounding the apartment which were included within the fenced apartment area. It is submitted that this invasion to obtain a view of suspected illegal activities constituted a violation of the Fourth and Fourteenth Amendments and a violation of the first criterion of *Coolidge, supra,* for a plain view search.

However, assuming, for the purpose of argument, that the first criterion of *Coolidge, supra,* was met by the police, the search was still invalid under the plain view doctrine for the reason that the second criterion, that of inadvertence, was not met. The police had the apartment under surveillance. The police went to apartment 28 for the sole purpose and with the single intent of looking in the window to discover evidence of a crime. The facts clearly demonstrate that this was not a situation where a police officer inadvertently stumbled upon evidence of a crime, but a case where the police, with prior calculation, surreptitiously peered into a private dwelling with the intent

and anticipation of discovering evidence of a crime. Consequently, Petitioner respectfully submits that the search cannot withstand scrutiny under the plain view standards established by *Coolidge vs. New Hampshire, supra.* See also *United States vs. Sanchez 509 F.2d 886 (6th Cir. 1975).*

It is therefore, respectfully submitted that the case at bar presents issues of substantial constitutional import and of great public importance in the determination of the application of the "plain view" doctrine and in the delineation of privacy rights of apartment occupants under the Fourth and Fourteenth Amendments to the United States Constitution.

2. WHERE POLICE OFFICERS OBSERVE WHAT THEY BELIEVE TO BE CONTRABAND WITHIN A CONSTITUTIONALLY PROTECTED AREA, AND HAVE AN AMPLE OPPORTUNITY TO SECURE A SEARCH WARRANT BEFORE SEIZING THE SUSPECTED CONTRABAND, ABSENT EXIGENT CIRCUMSTANCES, THE SEIZURE OF THE SUSPECTED CONTRABAND, WITHOUT A WARRANT IS UNREASONABLE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. *Coolidge vs. New Hampshire, 403 U.S. 443 (1971).*

It is axiomatic that the Fourth Amendment to the Constitution of the United States as applied to the states through the Fourteenth Amendment to the Constitution prohibits unreasonable seizures of property as well as unreasonable searches.

Numerous federal and state courts have consistantly held that "plain view alone is never enough to justify the warrantless seizure of evidence." *Coolidge vs. New Hampshire, supra; Fixel vs. Wainwright, 492 F.2d 480 (5th Cir. 1974); State vs. Albert, 360 S. 2d 137 (Fla. App. 1978); State vs. O'Herron, 380 A. 2d 768, 153 N.J. Super. 570 (1977); State vs. Colvin, 358 So. 2d 1250 (La. S. Ct. 1978).*

In *State vs. Schur, 538 P. 2d 689, 217 Kan. 741 (Supreme Court Kansas 1975),* the Court, relying on *Coolidge vs. New Hampshire, supra,* stated that:

> The correct procedure, in the absence of exigent circumstances when an officer comes upon evidence in plain view would be . . . (to) obtain(ed) a valid search warrant.
>
> 538 P. 2d at 694.

In that case, an officer had observed a rolled yellow cigarette through a patio door and smelled the odor of burning marijuana. The Court suppressed the warrantless seizure of the marijuana.

The case at bar closely parallels the above-cited cases. In the instant case there were no extigent circumstances; and, in fact, as far as the officers knew, the Petitioner was unaware of their presence until he was alerted by the police officers' knocking on the door. Petitioner submits and, if certiorari is accepted, will argue that the police cannot create an exigency and then rely upon it to justify a warrantless seizure of evidence. The proper procedure would have been for the officers to secure a search warrant for the premises, so that the constitutional mandates of a determination of probable cause by a neutral magistrate could have been met.

It is respectfully submitted that the issue presented herein represents a substantial constitutional question and

a matter of great public importance. This issue presents an opportunity for the Court to speak to the subject of warrantless seizures of evidence and to clarify the circumstances under which evidence may be seized absent a search or arrest warrant under the Fourth and Fourteenth Amendments to the Constitution of The United States.

3. WHERE INCRIMINATING STATEMENTS MADE TO POLICE OFFICERS ARE THE DIRECT FRUITS OF AN ILLEGAL ARREST, SUCH STATEMENTS ARE OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to trial, Petitioner duly filed a motion to suppress any and all statements made by him following his arrest. The trial Court overruled said motions on the grounds that the original arrest and search and seizure were lawful; therefore, any statements made subsequent to the arrests were admissible. The Court of Appeals affirmed that decision.

As Petitioner has shown in the preceding portions of this brief, the search and seizure giving rise to the arrest of Petitioner were unconstitutional and, therefore, unlawful. Prior to the unlawful search, the police has no probable cause to enter the private dwelling or to arrest Petitioner. Consequently, the arrest was unlawful.

Petitioner respectfully submits that any statements made by him were a direct result of his unlawful arrest. Therefore, these fruits of the illegal arrest should have been suppressed under the doctrine established by the United States Supreme Court in the cases of *Wong Sun vs. United States, 371 U.S. 471 (1963): Silverthorne Lumber*

Company vs. United States, 251 U.S. 385 (1920); and Nardone vs. United States, 308 U.S. 338 (1939).

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Petitioner, James Bubolski's undersigned counsel hereby certifies that he served a copy of the foregoing Petition for Writ of Certiorari to the Ohio Supreme Court on George C. Smith, Franklin County Prosecuting Attorney, Hall of Justice, 369 South High Street, Columbus, Ohio 43215, by regular mail, postage prepaid on July 27, 1979.

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APPENDIX

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

State of Ohio,	:	
Plaintiff-Appellee,	:	
vs.	:	No. 78AP-397
Stephen F. Taylor,	:	
Defendant-Appellant.	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	
vs.	:	No. 78AP-505
James J. Bobulski,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on December 14, 1978, the assignments of error are overruled, and it is the judgment and order of this court that the judgments of the Franklin County Court of Common Pleas are affirmed.

WHITESIDE, REILLY and McCORMAC, JJ.

By Judge John M. McCormac

cc: William A. Reddington
R. William Meeks
Barry D. Levy

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

State of Ohio,	:	
Plaintiff-Appellee,	:	
vs.	:	No. 78AP-397
Stephen F. Taylor,	:	
Defendant-Appellant.	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	
vs.	:	No. 78AP-505
James J. Bobulski,	:	
Defendant-Appellant.	:	

DECISION

Rendered on December 14, 1978

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James J. Bobulski.

McCORMAC, J.

These cases have been consolidated for appeal as the same legal issues are applicable to both. Defendant Taylor was charged with one count of possession of marijuana, and defendant Bobulski was charged with one count of possession of marijuana and two counts of possession of Schedule II drugs. Both defendants filed timely motions to suppress physical evidence seized and statements made, all of which were overruled. Thereafter, Taylor entered a plea of no contest to attempted trafficking in marijuana, and Bobulski entered a plea of no contest to trafficking in marijuana. Both defendants were found guilty and sentenced accordingly.

From the judgment of the trial court, defendants have appealed, setting forth the following assignments of error:

1. "The trial court erred in overruling appellants'

motion to suppress physical evidence obtained through a warrantless search of appellants' apartment in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States and Section 14 Article I of the Ohio Constitution."

2. "The trial court erred in overruling appellants' motion to suppress physical evidence obtained through a warrantless seizure of evidence in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States and Section 14 Article I of the Ohio Constitution."

3. "The trial court erred in overruling appellants' motions to suppress statements made to authorities after their arrest in violation of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I Section 10 of the Ohio Constitution."

Two Columbus police officers assigned to the narcotics bureau had an apartment located at 28 East Sherman Avenue, Columbus, Ohio, on surveillance on October 26, 1977. At about 9:00 a.m., defendant Bobulski entered the apartment carrying a gym bag and a guitar case. The apartment building is located about 40 yards from the street and is surrounded by a chain-link fence with a gate. There is a walkway entrance which runs along the apartment from the street sidewalk, which is used for entry to the various apartments located therein. At the time Bobulski was seen, the police officers were observing the apartment from the alley. After being informed by another surveillance crew that Bobulski had entered the apartment, a police officer walked along the sidewalk within the gate used for traffic to the various apartments, and from the apartment sidewalk looked into the apartment which had a large bay window in front of it with no curtains or other obstructions, other than a hanging plant which came down about a quarter of the way in the window. At that time, Officer Stevens observed Bobulski and the other defendant Taylor inspecting plastic baggies containing a brownish substance. From Officer Stevens' experience, the substance and the type of packaging was of the manner usually associated with packing of marijuana for sale. According to Officer Stevens, from what he observed through the window, he "suspected the brownish substance was marijuana." Stevens then went to the door, knocked and got no response. He knocked again and still receiving no response, heard some noises inside the apartment, so he jumped back off the porch onto the apartment walkway, looked into the bay window and saw that "Mr. Taylor had gathered up the marijuana into his arms in the bag and was making it towards the dining room or rear portion of the apartment and was looking back towards the front. I don't know if he actually saw me * * *." Another detective ran to the back and apprehended Taylor as he was coming out the back-door of the residence.

The officers searched the back of the apartment for discarded marijuana and did not find any, and then saw the substance lying on the floor in the kitchen, whereupon they entered the kitchen to seize the marijuana and to arrest Bobulski, Taylor already having been arrested. After entering the apartment, they saw in the open guitar case plainly visible bottles containing several thousand Schedule II drugs and a plastic bag which contained pharmaceuticals. Admittedly, Officer Stevens' initial purpose in entering the apartment area from the street on the walkway was to visually investigate what could be seen inside the apartment, without, as testified by Officer

Stevens, "committing trespass." There were no "No Trespass" signs at the sidewalk and the apartment sidewalk was freely accessible to those persons choosing to use it.

After defendants were arrested, they were taken to Columbus Police Headquarters where, after being advised of their *Miranda* rights, and signing *Miranda* waivers, they made incriminating statements concerning their possession of the illegal narcotics.

The trial court overruled all of the motions to suppress, ruling that the police officer who made his observations from the walkway within the apartment complex was not a trespasser and was rightfully at that position for observing what he was able to observe. The trial court found that what the officer observed gave him probable cause to make the arrests and to seize the contraband in plain view, and that since the search and seizure was legal, there being no other basis for suppressing the statements, the statements were also admissible.

The first two assignments of error are combined for discussion as they are interrelated.

The first issue is whether Officer Stevens violated defendants' Fourth Amendment right against unreasonable searches and seizures by entering onto the apartment complex walkway to observe defendants' actions through the window of their apartment.

Appellants rely primarily upon the case of *Katz vs. United States* (1967), 389 U.S. 347, where it was held that there was a violation of petitioner's Fourth Amendment rights by monitoring his calls from a telephone booth through an electronic device. However, in *Katz*, the United States Supreme Court made the following comment pertinent to this case:

" * * * the Fourth Amendment protects people, not

> places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

The defendants herein made no particular effort to preserve as private what Officer Stevens saw when they opened the guitar case and exposed the marijuana in plastic bags to view in front of a window not protected by drapes or other obstructions. However, appellants seek a declaration that the observation of that activity by Officer Stevens constituted an illegal search by asking us to draw the narrow guideline that, even though there was not an expectation of privacy from other occupants of the apartment complex or their invitees, there was such as related to a suspicious police officer who enters onto the sidewalk without invitation or other business in the apartments. We do not believe that that narrow distinction should be made. Officer Stevens had a right to use the semi-public walkway for purposes of observing illegal activity taking place within plain view of that walkway. There was no trespass that took place; thus, distinguishing this case from that of *United States vs. Carriger* (Sixth Cir., 1976), 541 F. 2d 545, where narcotic officers entere dan apartment house which could only be opened by a key or by someone inside activating a buzzer system by surreptitiously slipping into the building, thus gaining a vantage point from which to observe illegal activity. In this case, there was nc physical invasion of a protected area so that whatever was observed by the officer was usable in determining probable cause for arrest. Officer Stevens was not a trespasser but a licensee

who had a right to be on the sidewalk within the premises, even though the purpose was to observe potentially illegal activity.

This case is clearly distinguishable from that of *State vs. DeShong*, unreported Franklin County Common Pleas Court case No. 43347, decided October 21, 1966, where the arresting officers left the sidewalk and came up to the front porch of the house pushing aside shrubbery in front of a bedroom window and then peering through a small gap under the venetian blind to observe illegal activity. In this case, there was no invasion of the curtilage as in *DeShong*, nor did the defendants herein attempt to conceal their activities from other members of the public.

What is seen while legally investigating a crime is not subject to the "plain view" doctrine requirement that the sighting of the contraband must be inadvertent. The trial court properly found probable cause for an arrest for a narcotics violation based upon Officer Stevens' testimony of his observations. A reasonable person was entitled to believe that the defendants were trafficking in marijuana based on what was observed by Officer Stevens from the walkway even without the ambiguous action of Taylor in hastily leaving the apartment through the rear door.

The arresting officers were justified in entering the house to arrest Bobulski and to seize the contraband which was in plain view of the officers. Seizue of the evidence was proper incident to the lawful arrests.

Assignments of error numbers one and two are overruled.

The third assignment of error is overruled on the basis that no grounds were advocated for suppression of the

incriminating statements other than the fact that they were fruits of illegal arrest and search. Since the arrests and search were not illegal, neither was the obtaining of the statements.

Appellants' assignment of error number three is overruled.

Appellants' assignments of error are overruled, and the judgment of the trial court is affirmed.

WHITESIDE and REILLY, JJ., concur.

THE SUPREME COURT OF THE STATE OF OHIO

No. 79-189

1979 TERM

To wit: April 12, 1979

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,

vs.

Stephen F. Taylor and James J. Bobulski,
Appellants.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for Franklin County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Barry D. Levy.....

.....

.....

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .....*day of*..... *19*.....

.....*Clerk*

.....*Deputy*

Supreme Court, U. S.
FILED
AUG 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

No. 79-43

STATE OF OHIO,
Respondent,

vs.

JAMES J. BOBULSKI,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for Franklin County, Ohio is adequately set out in the petition. The judgment of the Ohio Supreme Court declining a motion for leave to appeal is adequately set out in the petition.

JURISDICTION

Jurisdiction is adequately set forth in the petition, 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. WHERE PETITIONER CONDUCTS A DRUG TRANSACTION WHILE SITTING IN FRONT OF AN UNOBSTRUCTED BAY WINDOW IN PLAIN VIEW OF A SIDEWALK WHICH PROVIDES ACCESS TO THE PUBLIC TO THE APARTMENT COMPLEX, DOES HE HAVE A REASONABLE EXPECTATION OF PRIVACY WHEN HE IS OBSERVED BY A POLICE OFFICER LAWFULLY ON THAT SIDEWALK?

II. MAY EVIDENCE WHICH IS FOUND IN PLAIN VIEW BY A POLICE OFFICER INCIDENT TO A LAWFUL ARREST, AND IN DANGER OF BEING DESTROYED, BE PROPERLY SEIZED WITHOUT A SEARCH WARRANT?

III. SHOULD STATEMENTS MADE BY PETITIONER TO THE POLICE, FOLLOWING A LAWFUL ARREST AND AFTER A KNOWING INTELLIGENT AND VOLUNTARY WAIVER OF HIS CONSTITUTIONAL RIGHTS AS STATED IN *MIRANDA* V. *ARIZONA*, 384 U.S. 436 (1966), BE ADMISSIBLE INTO EVIDENCE DURING A TRIAL AGAINST HIM?

STATEMENT OF THE CASE

The trial court overruled petitioner's motion to suppress evidence and he entered a plea of no contest to

trafficking in marijuana. The Court of Appeals affirmed the judgment in a unanimous decision, and the Ohio Supreme Court overruled petitioner's motion for leave to appeal finding no substantial constitutional issue was involved. Petitioner now seeks this Court to grant a Writ of Certiorari.

On the morning of October 26, 1977, Columbus Police Officers assigned to the Narcotics Bureau conducted a surveillance on 28 East Sherman Avenue and observed petitioner enter the ground floor of an apartment carrying a gym bag and a guitar case. One of the officers walked on the complex sidewalk which provides access to the public to the apartments. From the sidewalk he observed petitioner and a co-defendant in his plain view through an unobstructed large window, inspect three large bags containing a brownish substance.

Recognizing the material as marijuana, the officer knocked on the door. He got no response to his knock but heard scurrying around inside. He stepped back to the sidewalk, looked and saw the co-defendant gather up the bags of marijuana and rush to the rear of the apartment. The co-defendant was apprehended by another officer as he ran out the back door. The officers observed the bags of marijuana on the floor in the kitchen, and entered the apartment to seize it and arrest petitioner. One of the officers then went through the apartment to secure it and found the guitar case beside the gym bag which was on the floor, open, and were observed to contain several thousand amphetamines and barbituate drugs.

ARGUMENT I

WHERE PETITIONER CONDUCTS A DRUG TRANSACTION WHILE SITTING IN FRONT OF A BAY WINDOW WITH THE DRAPERIES OPEN IN FRONT OF A SIDEWALK, HE HAS NO REASONABLE EXPECTATION OF PRIVACY AND CONSEQUENTLY THERE IS NO CONSTITUTIONALLY IMPERMISSIBLE SEARCH WHEN HE IS OBSERVED BY A POLICEMAN.

The Fourth Amendment protects people, not places, and that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. *Katz* v. *United States,* 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967), and again in *United States* v. *Santana,* 427 U.S. 38, 42, 96 S. Ct. 2406, (1976). Mr. Justice Harlan stated in his concurring opinion in *Katz* that for a person to claim the benefit of the Fourth Amendment protection, he must have exhibited an actual (subjective) expectation of privacy, and that the expectation be one society is prepared to recognize as reasonable. A man's home, for most purposes, is a place where he expects privacy, but objects, activities or statements that he exposes to the "plain view" of outsiders are not protected because no intention to keep them to himself has been exhibited. *Katz.,* at 361.

Petitioner had no reasonable expectation of privacy in this matter. The police officer was able to freely pass through the gate of a short chain link fence and along the sidewalk. The Court of Appeals of Ohio noted the sidewalk provided free access to the public to the apartment complex. From the sidewalk the police officer

readily observed in his plain view through an unobstructed large ground floor window, petitioner and his co-defendant conduct what appeared to be a drug transaction.

The various courts have repeatedly found that a person has no reasonable expectation of privacy where a government agent sees or hears matters occurring within an apartment unaided from a common area outside that apartment. *United States* v. *Llanes,* 398 F. 2d 880 (2nd Cir., 1968); *United States* v. *Wilkes,* 451 F. 2d 938 (2nd Cir., 1971) (voices clearly audible in hallway); *United States* v. *Coplen,* 541 F. 2d 211 (9th Cir., 1976) (government agent observed marijana debris through an airplane window); *Ponce* v. *Craven,* 409 F. 2d 621 (9th Cir., 1969) (police officers observed criminal activity through a motel window while standing in the parking lot).

In *United States* v. *Carriger,* 541 F. 2d 545 (6th Cir., 1976), which petitioner cites, the court suppressed evidence discovered by a government agent in the hall of an apartment building. It is important to note there the government agent surreptitiously entered the locked building, and the appellant had a reasonable expectation of privacy in the locked building.

Petitioner also relies on the decision in *Fixel* v. *Wainwright,* 492 F. 2d 480 (5th Cir., 1974). *Fixel* concerns a dopkit containing heroin which was seized in a fenced in backyard. The court there noted the backyard of Fixel's home was not a common passageway normally used by the building's tenants for gaining access to the apartments, nor is it an area open as a corridor to salesmen or other businessmen who might approach the tenants in the course of their trade. That court distinguished this

case from *United States* v. *Freeman,* 426 F. 2d 1351 (9th Cir., 1970) where it found the common stairway and common porches of a multi-tenanted apartment house are not within the "curtilage" of each tenant. *Freeman,* at 1353. It can be seen the common sidewalk in the matter at hand falls under *Freeman, supra.,* and not *Fixel, supra.*

For the foregoing reasons, petitioner's first argument fails to present a substantial constitutional question. It is respectfully submitted that the Writ of Certiorari should not issue on this question.

ARGUMENT II

EVIDENCE WHICH IS DISCOVERED IN PLAIN VIEW OF THE POLICE OFFICER MAY BE SEIZED WITHOUT A WARRANT AS CAN EVIDENCE WHICH MUST BE SEIZED DUE TO THE EXIGENT CIRCUMSTANCES EXISTING AT THE TIME.

The existence of exigent circumstances where evidence is in danger of being removed or destroyed, has carved an exception into the requirement that a search warrant be obtained before that evidence is seized. See e.g. *Schemerber* v. *California,* 384 U.S. 757 (1966). Police observed petitioner's co-defendant attempt to flee with the three bags of suspected marijuana as he knocked on the door. The officers then apprehended the co-defendant in the back of the residence and saw the three bags on the floor in the kitchen. The officers properly entered the apartment to seize the drugs and arrest the petitioner who was still inside.

In all of the cases petitioner cites there is no likelihood

the evidence would have been destroyed before the police could get a search warrant. However, that danger was strongly present in this matter and the exigent circumstances were not created by the police.

The Court of Appeals noted that even if the exigent circumstances had not existed, the seizure of the evidence was proper incident to a lawful arrest. The officers were experienced in working with narcotics, and a reasonable person was entitled to believe petitioner was trafficking in marijuana.

The Ohio Supreme Court has stated in *Dixon* v. *Maxwell*, 177 Ohio St. 20 (1964):

> A search without warrant incident to and contemporaneous with a valid arrest does not violate the constitutional prohibition of illegal search and seizure. Also, such right to search extends to the premises upon which the arrest is made, and the evidence procured in such search is admissible.
>
> *Draper* v. *United States*, 358 U.S. 307; *Preston* v. *United States*, 84 S. Ct. 881; *Harris* v. *United States*, 331 U.S. 145; *United States* v. *Rabinowitz*, 339 U.S. 56; and annotation, 4 L. Ed. 2d 1982.

While the officers were arresting petitioner and securing the apartment they noticed the guitar case and gym bag in plain view in the middle of the living room floor. The gym bag was open and contained several thousand amphetamines and barbituate drugs, and their incriminating nature was immediately apparent. The seizure of these

drugs came under the plain view exception which applies where:

> . . . (1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating nature of the evidence was immediately apparent to the seizing authorities.
>
> *State* v. *Williams*, 55 Ohio St. 2d 82, (1978), syllabus paragraph one. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 464-471 (1971).

The police officers did not conduct a more general search than the exigent circumstances required, and the seizure of the evidence was reasonable under the circumstances.

For the foregoing reasons, this second argument presents no substantial constitutional question. It is respectfully submitted that the Writ of Certiorari should not issue on this question.

ARGUMENT III

WHERE A CRIME IS PROPERLY OBSERVED BY A POLICE OFFICER AND THE SUSPECT KNOWINGLY AND VOLUNTARILY WAIVED HIS *MIRANDA* RIGHTS, STATEMENTS MADE TO POLICE ARE PROPERLY ADMISSIBLE INTO EVIDENCE DURING A CRIMINAL TRIAL.

As noted, the actions of the police officers were not unreasonable and were in compliance with constitutional

requirements. Petitioner conceded during the suppression hearing that he was informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), that he acknowledged and understood these rights, and subsequently executed a waiver of those rights.

For the foregoing reasons, this third argument presents no substantial constitutional question. It is respectfully submitted that the Writ of Certiorari should not issue on this question.

CONCLUSION

Petitioner had no reasonable expectation of privacy while he conducted a drug transaction in plain view of a police officer who could readily observe him through an unobstructed window from a sidewalk which provides public access to the apartment complex.

The drugs were properly seized by the police officers due to the exigent circumstances at hand. They were taken incident to the petitioner's lawful arrest, and the drugs in the living room were in plain view of the police when the apartment was secured.

The statements made by petitioner to the police were pursuant to his lawful arrest, the proper seizure of evidence and his intelligent and voluntary waiver of his right to remain silent and have an attorney present.

It is respectfully submitted that in light of the decisions

of this Court and the courts of those several jurisdictions cited within, that the Writ of Certiorari should not issue.

Respectfully submitted,

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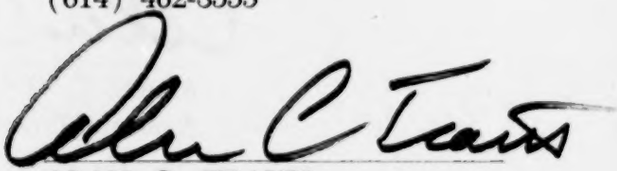

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Assistant Prosecuting Attorney

Counsel for Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(b) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon William J. Abraham, 24 North High Street, Columbus, Ohio 43215, this 2nd day of August, 1979, by United States mail, postage paid, and that all parties required to be served have been served.

ALAN C. TRAVIS
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Counsel for Respondent